IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LG ELECTRONICS U.S.A., INC., Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY and STEVEN CHU, PHD, in his official capacity as United States Secretary of Energy, Defendants.	)	Civil Action No. 09-2297 (JDB)

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF LG ELECTRONICS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The ENERGY STAR Program is a partnership between the federal government and its private and public ENERGY STAR partners designed to promote the use of highly energy-efficient products. From modest beginnings in 1992, the ENERGY STAR Program has grown to include 15,000 private and public partners, and the ENERGY STAR label at the heart of the Program has become a widely recognized and powerful brand that consumers rely on as representing the very highest standard of energy efficiency. Today, the ENERGY STAR Program delivers substantial benefits to consumers in the form of lower utility costs, to manufacturers in the form of enhanced returns on investments in innovative energy-efficient products, and to the public at large in the form of a reduction in pollutants caused by energy production, a more dynamic economy, and a nation with decreased reliance on foreign sources of energy. All these benefits depend on the government's ability to preserve the integrity and vitality of the ENERGY STAR label.

This case is about whether plaintiff LG Electronics U.S.A., Inc. ("LG") may continue using the ENERGY STAR label on certain refrigerators with automatic ice makers. Central to the dispute are two agreements signed by the parties: (1) a standard Partnership Agreement, signed in 2001, that created the ENERGY STAR partnership; and (2) a November 2008 Settlement Agreement that allowed LG to measure the energy consumption of certain models covered by that agreement using an exception to DOE's test procedure, until "further notice by DOE."

First, LG's ability to participate in the ENERGY STAR Program stems from the standard Partnership Agreement it entered into with ENERGY STAR (as represented by the Department

of Energy ("DOE")) in 2001. Under that Partnership Agreement, LG may only apply the ENERGY STAR label to its products if they meet the ENERGY STAR Program's heightened energy efficiency specifications, as measured under the applicable testing criteria. Consistent with the standard form, the Partnership Agreement contains its own informal dispute resolution procedure, and makes clear that the "agreement is wholly voluntary and may be terminated by *either party* at any time, and for any reason, with no penalty."

Second, in November 2008, the parties entered into a settlement agreement ("November 2008 Agreement") further defining the ability of LG to use the ENERGY STAR label on certain refrigerator-freezers. The November 2008 Agreement was reached after DOE learned that LG had been misapplying the test procedure underlying the ENERGY STAR criteria for residential refrigerators with automatic ice makers. DOE's long-established test procedure permits manufacturers to render any automatic ice maker "inoperative" during testing. DOE has consistently interpreted the term "inoperative" as requiring that the automatic ice maker be "on" but not operating (*i.e.*, making or harvesting ice), such as when the automatic ice maker senses a full ice storage bin. This interpretation ensures that the test procedure replicates the typical energy usage of an average consumer, whose use of ice is presumed to be sporadic, but who generally leaves his or her ice maker "on." Indeed, as another manufacturer reports, the majority of manufacturers in the appliance industry's trade association have affirmed that this is "the proper interpretation of the DOE test procedure." LG, by contrast, interprets the term "inoperative" as permitting it to test with its automatic ice maker turned "off," an approach that, by LG's own account, replicates the *atypical* energy usage of a consumer who has gone on vacation and conscientiously remembered to turn his automatic ice maker "off."

Until a few years ago, the practical difference between these different interpretations was minimal because the energy consuming components associated with an automatic ice maker's "on/off" switch (assuming one existed) consumed relatively small amounts of energy when not in the actual process of making or harvesting ice. But recent technological developments, in particular those related to the type of high-end French door "through-the-door" ice service refrigerator-freezers ("French door TTD models") at issue in this case, have caused a divergence (in the case of LG's models, a *substantial* divergence) between the measured energy usage when an ice maker is rendered "inoperative" by preventing it from making or harvesting ice, and when an automatic ice maker is turned "off."

In the summer of 2008, DOE became aware of test data that demonstrated that the energy consumed by certain LG models when tested with its ice maker "on" but "inoperative" was nearly twice that advertised to consumers. As noted above, that dispute led to the November 2008 Agreement. Under that Agreement, LG staved off enforcement proceedings by agreeing to take steps to ensure that certain French door TTD models would not be marketed under the ENERGY STAR label, to provide credits to consumers who had purchased these models, and to modify these models to increase their energy efficiency. LG's modified units were to be tested under a unique procedure whereby the models would be tested according to DOE's standard test procedure (*i.e.*, ice makers and their components "on" but "inoperative") "with the *exception* of the fill tube and ice ejection heaters, which [were permitted to] remain off for the purposes of testing under th[e] Agreement subject to further notice by DOE." As the quoted language indicates, LG's exception to DOE's normal test procedure was only intended to apply to those LG models that were subject to the November 2008 Agreement, was only intended to be used

until LG could develop more energy-efficient models, which the parties understood would be within a few months, and, most importantly, was only to be used until DOE provided "further notice," as defined in the Agreement.

One year later, after independent testing had revealed that certain of LG's French door TTD models continued to far exceed the ENERGY STAR specifications, and that LG continued to use the exception described above, DOE provided notice to LG, pursuant to the terms of the November 2008 Agreement, that the exception contained in that Agreement would be revoked. DOE also gave notice to LG of its intent to terminate the Partnership Agreement with respect to these models. As it currently stands, the only immediate effect of these actions is that, as of January 20, 2010, the LG refrigerator-freezers subject to the November 2008 Agreement will no longer be able to carry the ENERGY STAR label unless LG can demonstrate before that date that those products meet the ENERGY STAR specifications under normal test conditions. Recognizing the tremendous value consumers attach to this label, LG now asks this Court to grant a preliminary injunction preventing DOE from revoking the exception to its generally-applicable test procedure. Plaintiff cannot establish that it is entitled to such an extraordinary remedy.

As an initial matter, LG cannot demonstrate a substantial likelihood that it will prevail on the merits of its claims. First, DOE has not revised its testing procedures for the ENERGY STAR Program for residential refrigerators and, therefore, it has no obligation to comply with the notice and comment requirements of Section 131 of the Energy Policy Conservation Act of 2005 (42 U.S.C. § 6294a), or, assuming they are even applicable, the notice and comment requirements of the Administrative Procedure Act ("APA"). Likewise, LG has not demonstrated

that DOE's interpretation of the "further notice" provision of the November 2008 Agreement is arbitrary and capricious. Finally, LG does not have a protected property or liberty interest in continued participation in the ENERGY STAR Program, and, even if it did, it has received adequate process.

The balance of equities and the public interest likewise require denial of LG's motion. LG's claimed irreparable harm is inherently speculative both in its size and its duration. Furthermore, the injury to a single manufacturer who is no longer able to apply the ENERGY STAR label to refrigerator-freezers that are demonstrably *not* energy efficient is greatly outweighed by the damage that would be done to consumers of LG's products, LG's competitors, and, more broadly, the ENERGY STAR label, the thousands of manufacturers across hundreds of industries that use it to promote their energy efficient products, and the millions of consumers who rely on it as the trusted symbol of energy efficiency. In short, LG's motion for a preliminary injunction should be denied.

BACKGROUND

I. The ENERGY STAR Program

The ENERGY STAR Program is a voluntary program designed to promote energy efficient products for organizations and consumers in order to prevent pollution, protect the global environment, and reduce spending on energy. It is not a regulatory program, but consists of voluntary partnerships (with licensing agreements) between the government and industry participants that commit to manufacture products that meet the very highest standards of energy efficiency in return for the right for these products to bear the ENERGY STAR label. Zoi Decl.

¶ 5; *see generally* 63 Fed. Reg. 64,921 (Nov. 24, 1998).[1]

The ENERGY STAR Program began in 1992 as an effort to promote energy-efficient products. *See* 63 Fed. Reg. 64,921, 64,922 (Nov. 24, 1998). Section 127 of the Energy Policy Act of 1992 had directed DOE, working in cooperation with the Environmental Protection Agency ("EPA"), utilities, and appliance manufacturers, to submit "a report on the potential for the development and commercialization of appliances which are substantially more efficient than required by Federal or State law." *See* Pub. L. No. 102-486, § 127, 106 Stat. 2776, 2835 (1992). The report that DOE ultimately issued concluded that the federal government could play a positive role in encouraging consumer interest in higher efficiency products, and DOE began developing such a program, initially called the ENERGY SAVER Program, to implement the report's recommendations. 63 Fed. Reg. at 64,922. At around the same time, EPA was developing a similar program, known as the ENERGY STAR Program. *Id.* In 1996, DOE and EPA joined forces to build on these early successes under the banner of the ENERGY STAR Program.

Reflecting the continuing success of the ENERGY STAR Program over the course of the

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[1] In this respect, the ENERGY STAR Program is distinct from the Energy Conservation Program for Consumer Products Other than Automobiles ("EPCA") which imposes mandatory minimum energy-efficiency standards on certain products, including refrigerator-freezers. *See* 42 U.S.C. § 6295; 10 C.F.R. Part 430. Contrary to LG's assertion, Pl. Mem. at 7, LG has failed to establish this Court's jurisdiction with regard to EPCA's minimum energy-efficiency standards because DOE has not yet taken any "final agency action" under EPCA. See 5 U.S.C. § 704. DOE has not yet ordered LG to "remove [any] product from the marketplace," Pl. Mem. at 7, but rather has given LG a deadline by which it can no longer rely on the exception to DOE's normal test procedure for purposes of compliance with EPCA. Furthermore, DOE has agreed to consider extending that deadline if compliance within that timeframe proves "infeasible." See Nov. 25, 2009 Email from Harris to Wingate, at 1 (Pl. Ex. 1). As of yet, DOE has not undertaken the multi-step enforcement procedures required by DOE's regulations to determine noncompliance and order LG to cease distribution. See 10 C.F.R. §§ 430.70-74.

next decade, Congress enacted Sections 131 and 104 of the Energy Policy Conservation Act of 2005, which provided further statutory authority for the ENERGY STAR Program, and generally required federal agencies to purchase ENERGY STAR-rated products when available. Pub. L. No. 109-58, §§ 104, 131, 119 Stat. 594, 609-11, 620-21 (2005) (codified at 42 U.S.C. §§ 8259b, 6294a). Today, the ENERGY STAR Program is jointly administered by DOE and the EPA, with DOE responsible for monitoring and verifying compliance with the applicable testing criteria for a number of product categories, including the refrigerator-freezers at issue in this lawsuit. *See* Zoi Decl. ¶ 6.

The ENERGY STAR Program has been a tremendous success. From its humble beginnings, it has grown to cover over 60 product categories and is supported by a network of approximately 15,000 private and public sector organizations partners that serve more than 74 million households. *Id.* at ¶ 17. From 2000 through 2008, the public purchased more than 2.5 *billion* ENERGY STAR labeled products. *Id.* at ¶ 18. As this success demonstrates, the ENERGY STAR label itself has become a powerful means of directing consumers to the most energy-efficient products. Indeed, according to a Fall 2008 *National Awareness of Energy Star Report*, 78% of households had a "high" or "general" understanding of the label's purpose. *Id.* at ¶ 19.

The success of the ENERGY STAR Program has conferred significant benefits on the consumers who rely on the ENERGY STAR label as the government's certification that the products it adorns comply with the highest standards of energy efficiency. According to the EPA, in 2008 alone, the ENERGY STAR Program helped Americans save more than $19 billion on their utility bills while achieving reductions in greenhouse gas emissions equivalent to 29

million cars. *Id.* at ¶ 18. This consumer interest, in turn, has provided ENERGY STAR partners with the incentive to invest in researching and developing innovative products that provide the same level of quality and service, but do so in the most energy-efficient manner. *Id.* at ¶ 22.

Finally, the ENERGY STAR Program serves important policy interests, including reducing pollution associated with electricity production, increasing energy independence, and spurring economic growth through innovation. *Id.* at ¶¶ 22, 24. Most recently, federal and state governments have decided to make the ENERGY STAR Program a centerpiece of their efforts to stimulate economic growth, and do so in a way that supports the nation's long-term economic and environmental goals. *Id.* at ¶ 23. For example, over $300 million in funds provided by the American Recovery and Reinvestment Act ("ARRA") are currently being used to offer consumers rebates for the purchase of ENERGY STAR rated products. *Id.* at ¶¶ 12-14. A similar program uses a mix of rebates, and tax incentives to encourage state and local governments to replace conventional products with ENERGY STAR-rated products. *Id.* at ¶ 15.

All of these benefits—for the environment, for consumers' wallets, for our nation's economic and environmental health and quest to achieve energy independence— hinge on the government's ability to "preserve the integrity of the ENERGY STAR label." 42 U.S.C. § 6294a(c)(3). If consumers cannot rely on the ENERGY STAR label as the government's pledge that the product they are considering buying meets the highest standards of energy efficiency, all of these benefits are threatened. Consumers will spend more on electricity, manufacturers will have less incentive to innovate, and the environment and the economy will suffer as a result.

To ensure that these events do not come to pass and that DOE and EPA will have the

ability to protect the ENERGY STAR label, the Standard Partnership Agreements from which the entire ENERGY STAR Program is constructed provide for an informal and expedited dispute resolution process and a no-fault termination clause. *See* Standard ENERGY STAR Partnership Agreement (Ex. 1).[2] Specifically, the Standard ENERGY STAR Partnership Agreement states that the parties "will endeavor to resolve all matters informally, so as to preserve maximum public confidence in ENERGY STAR." *Id.* at 2. If the parties to the agreement (the ENERGY STAR Partner and DOE or EPA) cannot resolve a dispute informally, the party seeking corrective action "shall notify the other in writing as to the nature of the dispute, the specific corrective action sought and [the party's] intent to terminate the Partnership Agreement, either as a whole or in part, unless specific corrective actions sought are undertaken." *Id.* The Partner, upon receipt of such notification from EPA or DOE, must within 20 days agree to "undertake in a timely and effective manner the corrective actions sought" by EPA or DOE. *Id.* If the Partner does not respond within 20 days, does not agree to undertake the corrective actions sought by EPA or DOE, or agrees but does not initiate the corrective actions in a timely manner, then the Partnership Agreement "is terminated, either as a whole or in part." *Id.* Furthermore, the Standard ENERGY STAR Partnership Agreement provides that "[b]oth parties concur that this agreement is wholly voluntary and may be terminated by either party at any time, and for any reason, with no penalty." *Id.*

In 2001, LG signed a Partnership Agreement that is virtually identical to the Standard ENERGY STAR Partnership Agreement described above. *See* Ex. A to Zoi Decl. It provides that ENERGY STAR (represented by DOE) "will undertake a variety of efforts to build

[2] *See* http://www.energystar.gov/index.cfm?c=join.manuf_retail_agree.

awareness of the ENERGY STAR name and label, maintain the credibility of the ENERGY STAR label and name, and promote the benefits of energy-efficient homes, buildings, and products." *Id.* at 1. In return, LG agreed to comply with the ENERGY STAR Logo Use Guidelines and the ENERGY STAR Program Requirements, in this case the ENERGY STAR Program Requirements for Residential Refrigerators and/or Freezers ("Program Requirements"). *Id.* at 1.[3] In addition, the parties agreed to abide by the informal dispute resolution process described above, and "[b]oth parties concur[ed] that th[e] agreement is wholly voluntary and may be terminated by *either party* at any time, and for any reason, with no penalty." *Id.* at 2 (emphasis in original).

II. DOE's Consistent Interpretation of the Term "Inoperative" in the ENERGY STAR Testing Criteria for Residential Refrigerators and/or Freezers

LG's motion for a preliminary injunction involves a dispute over DOE's interpretation of the test criteria used to measure the energy efficiency of residential refrigerator-freezers that are set forth in the ENERGY STAR Program Requirements for Residential Refrigerators and/or Freezers. *See* Program Requirements, at 5 (Pl. Ex. 3). These test criteria incorporate the test procedures published in 10 C.F.R. 430, Subpart B, Appendix A1 ("Appendix A1"). *Id.* They also provide "principles of interpretation" that "should be applied to the existing DOE test procedures[,]" including the principle that "the unit, when tested under the DOE test procedure, *shall operate equivalent to the unit in typical room conditions*." *Id.* (emphasis added).

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[3] Among other things, the Program Requirements provide that "[a]s of April 28, 2008, all refrigerators and refrigerator-freezers 7.75 cubic feet or greater in volume must be 20% more efficient than required by the minimum federal standard in order to meet the ENERGY STAR criteria." Program Requirements, at 3 (Pl. Ex. 3). The minimum federal standard for a typical (24.7 Cu. Ft.) French door TTD model refrigerator, measured in kilowatt hours per year ("kWh/yr"), is 685 kWh/yr. McCabe Decl. ¶ 41. Thus, in order to satisfy the ENERGY STAR Program requirements, French door TTD models must consume no more than 548 kWh/yr. *Id.*

Appendix A1 generally provides that when performing an energy efficiency test the "electric refrigerator-freezer shall be installed and its operating conditions maintained in accordance with HRF-1-1979 [("HRF-1")], section 7.2 through section 7.4.3.3." Appendix A1, § 2.2. Section 7.4.2 of HRF-1 provides, in turn, that "[a]utomatic ice makers are to be *inoperative* during the test." *See* HRF-1, § 7.4.2 (Pl. Ex. 7) (emphasis added). The meaning of the term "inoperative" in this simple sentence is central to the present dispute.

DOE has consistently and properly interpreted this provision as requiring that refrigerator-freezers are to be tested with automatic ice makers "on" but rendered "inoperative" by, for example, replicating the state of an automatic ice maker when it senses that its ice storage bin is full. *See* Additional Guidance Regarding Application of Current Procedures for Testing Energy Consumption of Refrigerator-Freezers with Automatic Ice Makers (Dec. 19, 2009) ("December Guidance"), at 3 (Ex. 2).[4] This interpretation is based on HRF-1's definition of automatic ice maker, which explicitly references an automatic ice maker's ability to "automatically interrupt the harvesting *operation* when the bin is filled to a predetermined amount," *see* HRF-1, § 3.5 (emphasis added), and in the description of automatic ice maker "operation" elsewhere in HRF-1. *See* HRF-1, § 7.8.3.2.

This interpretation also comports with the purpose of the test procedures, which is to measure a product's energy usage under conditions that replicate use by a typical consumer. *See, e.g.*, Program Requirements, at 5 (Pl. Ex. 3); 42 U.S.C. § 6293(b)(3). As explained in the December Guidance, it "most accurately reflects the real-world energy use of these devices

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[4] *See* http://www1.eere.energy.gov/buildings/appliance_standards/residential/refrigerators_freezers.html

because it includes in the energy efficiency calculation the energy used whenever the ice maker is powered on (as it will be most, if not all, of the time in normal household use), while excluding from the efficiency calculation the energy used when the ice maker is operative – *i.e.*, when it is *actively* making and harvesting ice[,]" which could reasonably be expected to "occur only intermittently." December Guidance, at 2 (Ex. 2). Thus, a proper application of the test procedures will exclude from measurements of energy use any energy consumed by the actual making and harvesting of ice, but will include any energy consumed by the refrigerator-freezer when the ice maker is turned "on" but is not actually "operating" — *i.e.* it is "inoperative." *See id.* at 2. LG, by contrast, contends that an automatic ice maker is rendered "'inoperative' by switching the automatic ice maker off during energy consumption testing." Pl. Mem. at 14. Far from replicating the "typical" use by consumers, LG itself points out that this approach replicates consumers' use while "on vacation." *Id*.[5]

When HRF-1 was published, and for many years thereafter, this distinction between "inoperative" and "off" had little practical effect. Automatic ice makers were typically located in the freezer section of refrigerator-freezers and the components associated with such ice makers rarely consumed energy when they were not actively making or harvesting ice. McCabe Decl. ¶¶ 5-8. This began to change around 2006, with the advent of French door TTD models. *Id.* at ¶ 9. Unlike any other type of refrigerator that had been produced up until that point, French door TTD models do not locate their automatic ice makers in the freezer compartment,

[5] Some but not all models of refrigerator-freezers' automatic ice makers are equipped with an "on/off" switch. *See* McCabe Decl. ¶ 9. Presumably, a consumer of LG's French door TTD model might want to turn his or her ice maker off "before leaving on vacation" to conserve the significant amount of energy that LG's refrigerator-freezers' automatic ice makers consume when they are "on" but "inoperative." *See* McCabe Decl. ¶¶ 17, 40, 41.

but, in order to save consumers the effort of bending over to retrieve ice from the bottom mounted freezer, incorporate a separate ice-making assembly within the fresh food compartment or in the door to the fresh food compartment. *Id.*

This particular innovation presented several design challenges, including the need to supply cold air from the freezer compartment without causing condensation to develop on those sections of the refrigerator compartment walls that house the cold air ducts. *Id.* at ¶ 10. To address the problem of condensation, many manufacturers began using electrically powered heaters, which prevented condensation but dramatically increased the energy consumption of these models as compared to traditional refrigerator-freezers. *Id.* at ¶¶ 11, 12. Furthermore, in certain designs, much of this additional energy was consumed even when the automatic ice maker was not engaged in the actual process of making and harvesting ice. *Id.* As these models became more popular, the difference in terms of energy consumption between tests using DOE's interpretation of the term "inoperative" (*i.e.*, with the automatic ice maker "on" but not making ice), and tests conducted with the automatic ice maker (and its associated components) "off," became significant.

III. The November 2008 Agreement Gave LG a Temporary, Limited Exception to DOE's Test Testing Criteria Subject to Further Notice by DOE

DOE first became aware of allegations that LG was misapplying the test procedure when testing certain of its French door TTD models in 2008. McCabe Decl. ¶ 15. DOE met with LG and requested that LG provide more specific information regarding LG's application of the test procedure and test data for these models. *Id.* at ¶ 15-16. LG responded to these requests in August 2008, admitting that when tested with the automatic ice maker on but not making ice, the LG model consumed nearly double the amount of energy permitted by the applicable ENERGY

STAR standard. *Id.* at ¶ 17. As a result of this information, DOE began considering enforcement proceedings. *Id.* at ¶ 18.

In October 2008, the parties began negotiating to resolve what one of LG's representatives during these negotiations, Timothy McGrady, accurately describes as a dispute over "what it meant to be 'inoperative' during energy consumption tests of refrigerators." McGrady Decl. ¶ 14. As Mr. McGrady explains, "LG understood 'inoperative' to mean that placing the ice maker ON/OFF switch in the OFF position would turn off all components of its ice-making system." *Id.* at ¶ 16. DOE, by contrast, believed that the test procedures required ice makers to be "inoperative, not off," and explained this to LG's representatives during the negotiations. McCabe Decl. ¶ 19.

During the negotiations, LG sought support for its position by relying on a slide used by DOE in a PowerPoint presentation at a public meeting on the Framework for Residential Refrigerators and Freezers, held Monday, September 29, 2008. *Id.* at ¶ 20. The slide incorrectly states that "[t]he DOE energy test is carried out with the ice maker turned off." *See* Pl. Ex. 11. LG again relies on the statement in that slide in this lawsuit. Pl. Mem. at 14 (citing Pl. Ex. 11). But LG fails to inform the Court that when this slide was presented at the meeting, a DOE official, Ron Lewis, immediately stated, as a "point of clarification," that "[t]he phraseology on that [slide] should have been, the icemaker should have been inoperative, not turned off." *See* McCabe Decl. ¶ 20; 9.29.08 Refrigerator Framework Meeting Transcript, at 36-37 (Ex. A to McCabe Decl.). John Taylor, a representative of LG, and John Hodges, LG's outside counsel were both present at the meeting, and would have heard this "point of clarification." *See* 9.29.08 Refrigerator Framework Meeting Transcript, at 2. If they missed it during the meeting, they

were informed again during a meeting with DOE held on October 6, 2008. McCabe Decl. ¶ 20.

As other industry participants have recognized, DOE has always interpreted the term "inoperative" in HRF-1 as meaning that automatic ice makers must be "on" but not actively making ice. *See* Whirlpool's Response to Guidance 12-21-09 (Ex. 3). DOE never suggested otherwise to LG during the course of their negotiations over what would become the November 2008 Agreement. *See* McCabe Decl. ¶ 24. Rather, in that agreement, LG sought and received an exception to this general rule for their fill tube heater and ice ejection heater that DOE understood would be a "temporary measure intended to avoid the possibility that their models would fail to satisfy the federally mandated standards for maximum allowable energy use." *Id.* at ¶ 24. The final version of the November 2008 Agreement reflects the fact that the exception granted to LG for its fill tube and ice ejection heaters was limited in that those heaters were permitted to "remain off [(1)] for purposes of testing under th[e] Agreement [and (2)] subject to further notice by DOE." November 2008 Agreement, at 3 (Pl. Ex. 2).

With respect to the second of these limitations, DOE never represented to LG that "further notice" meant notice and comment rulemaking. McCabe Decl. ¶ 26. The November 2008 Agreement provides that "LG will use its best efforts to produce ENERGY STAR-rated versions of the Affected Models by January 2009." November 2008 Agreement, at 4 (Pl. Ex. 2). DOE reasonably understood this as a promise that LG would strive to produce models that could meet the ENERGY STAR specifications without the exception provided in paragraph 3, and that, if LG did not do so in a timely fashion, DOE could revoke the exception by providing LG a simple "notice." McCabe Decl. ¶¶ 26, 27. The November 2008 Agreement includes a requirement in paragraph 17(h) that all "[n]otices . . . related to the obligations listed in the

Agreement" be delivered to particular DOE and LG individuals. November 2008 Agreement, at 6. The "notice" referenced in paragraph 3 is the only other time the term "notice" is used in the Agreement, and, indeed, the only correspondence of any type from DOE to LG specifically contemplated by the agreement. *See generally id.*

In summary, the testing procedures outlined in paragraph 3 of what would become the November 2008 Agreement, specifically DOE's agreement to permit LG to turn its fill tube and ice ejection heaters off "for purposes of testing under th[e] Agreement" was intended to provide LG with a *temporary* exception to the normal testing procedures, so that LG would not fail to meet federally mandated minimum energy-efficiency standards during the short time LG said it needed in order to design and bring to market new more energy-efficient models. McCabe Decl. ¶ 27. Under the November 2008 Agreement's plain terms, this temporary exception could be withdrawn by DOE by simply delivering a notice stating that LG could no longer rely on the exception.

IV. The Enforcement Efforts that Precipitated this Lawsuit

This lawsuit arises from actions DOE took in November 2009 pursuant to the terms of the November 2008 Agreement and the underlying ENERGY STAR Partnership Agreement with LG. DOE's expectation that, shortly after execution of the Agreement, LG would follow through on its "best efforts" commitment and produce ENERGY STAR-rated versions of the Affected Models without reliance on the exception proved overly optimistic. In the fall of 2009, DOE received reports from independent labs indicating that, when tested without the exception for fill tube and ice ejection heaters, certain of LG's French door TTD models consumed 20 to 35% more energy than was reported to consumers. *Id.* at ¶ 40. Additional tests, performed by

another independent lab at DOE's direction, confirmed that certain of LG's French door TTD models could not meet the ENERGY STAR criteria, and in some cases, the federally mandated standards, when tested pursuant to Appendix A1. *Id.* at ¶ 41. After a meeting in September 2009, LG sent a letter to DOE stating its view that it was permitted to continue testing these models under the exception in the November 2008 Agreement. *See* November 10, 2009 Letter from Harris to Hodges, at 1-2 (Pl. Ex. 1) (referencing September 22, 2009 letter from LG).

DOE responded in a November 10, 2009 letter, in which DOE explained that it had "concluded that LG's reliance on the test procedure exception set out in the [November 2008] Agreement has given LG an unintended advantage in the marketplace and resulted in significant underreporting of the energy consumption of LG models to both DOE and consumers." *Id.* at 2. Accordingly, consistent with the terms of the Agreement, DOE [provided] notice that the agency is revoking the exception provided in paragraph 3 of the Agreement and requiring LG to follow the DOE test procedure." *Id.* As a result,

> All LG models are to be tested according to DOE's interpretation of the operating conditions specified in HRF-1-1979, which require that the ice making system of the refrigerator be disabled for purposes of making ice [i.e., "inoperative"] but that all **other system components remain on during testing including the fill tube and ice ejection heaters.**

Id. Initially, DOE provided LG with 15 days to remove the ENERGY STAR labels from models in its possession, alert retailers to remove ENERGY STAR labels from units in their possession, and report back to DOE on the steps it has taken to complete to comply with these directions. *Id.* In recognition of LG's possible reliance on the exception contained in the November 2008 Agreement, however, DOE permitted LG to continue relying on the exception to test covered models for 120 days for the separate purpose of meeting federally mandated minimum standards.

Id.[6] DOE has not, as yet, made a determination, pursuant to its regulations, that these models are noncompliant with the mandatory energy-efficiency standards. 10 C.F.R. §§ 430.70-74.

Following more meetings and presentations by LG, DOE agreed to extend the 15 day deadline to January 2, 2010. As a result, LG would have to remove ENERGY STAR labels from the affected models by "January 2, 2010 *unless* before that date LG provides DOE with data demonstrating, to [DOE's] satisfaction, that the models comply with the applicable ENERGY STAR criteria when tested without the exception, *i.e.*, including energy consumed by the fill tube and ice ejection heaters." Nov. 25, 2009 Email from Harris to Wingate, at 1 (Pl. Ex. 1) (emphasis added). Furthermore, although DOE did "not think it [was] required," DOE agreed to "issue further public guidance on the correct application of DOE's test procedure, as outlined in our November 10, letter." *Id.*[7]

On December 4, 2010, LG filed the instant lawsuit. LG filed the instant motion for a preliminary injunction five days later, on December 9, 2010. To accommodate the briefing schedule for this motion, DOE agreed to extend the January 2, 2010 deadline to January 20, 2010. DOE issued guidance on December 18, 2009, which simply expanded upon the

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[6] The November 10, 2009 letter was delivered to LG's counsel, John Hodges, at the address for providing notices specified in paragraph 17(h) of the November 2008 Agreement. On November 13, 2009, John Taylor, Vice President, Government Relations & Communications, for LG, Mr. Hodges and others attended a meeting at DOE to discuss the November 10 letter. On December 4, 2009, a copy of the November 10 letter was delivered directly to Mr. Taylor as well.

[7] At the same time, the 120 day deadline for compliance with federally mandated minimum standards was extended to 127 days. DOE acknowledged, however, that "LG is working aggressively to bring new products to market," and offered that should LG "find compliance with the 127 day timeframe infeasible," it could "propose a date for [DOE] to consider that you believe to be feasible given LG's product development and manufacturing process." *Id.*

explanation of the test procedure set forth in DOE's November 10, 2009 letter, which, in turn, was consistent with DOE's interpretation throughout the course of its two year dispute with LG. *See* December Guidance (Ex. 2). To date, LG has not provided any evidence that its French door TTD models comply with the ENERGY STAR criteria without the November 2008 Agreement's exception for fill tube and ice ejection heaters.

ARGUMENT

I. Standards for the Issuance of a Preliminary Injunction

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (citation omitted) (internal quotation marks omitted); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (A preliminary injunction is "'an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion.'" (quoting *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)). For a plaintiff to prevail on a motion for preliminary relief, it must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested (nonmoving) parties; and (4) that the public interest would be furthered by the injunction. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *see also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

As this Court recently explained:

> It is particularly important for the moving party to demonstrate a substantial likelihood of success on the merits. Indeed, without any probability of prevailing on the merits, the Plaintiffs' purported injuries, no matter how compelling, do not justify preliminary injunctive relief. The irreparable injury requirement also

> erects a very high bar for a movant. A plaintiff must show that it will suffer harm that is more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff. To warrant emergency injunctive relief the alleged injury must be certain, great, actual, and imminent. In this jurisdiction, harm that is "merely economic" in character is not sufficiently grave under this standard.

Robinson-Reeder v. Am. Council on Educ., 626 F. Supp. 2d 11, 14 (D.D.C. 2009) (internal quotations and citations omitted). These "four factors 'are not considered in isolation from one another, and no one factor is necessarily dispositive as to whether preliminary injunctive relief is warranted. Rather, the factors interrelate on a sliding scale and must be balanced against each other.'" *Id.* (quoting *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001)). "'If the plaintiff makes a particularly weak showing on one factor, however, the other factors may not be enough to compensate.'" *Id.* (quoting *Morgan Stanley*, 150 F. Supp. at 73). LG cannot satisfy any of the factors here.

II. LG is Not Likely to Succeed on the Merits

This case presents a dispute between the parties regarding LG's improper application of the test criteria for measuring compliance with the ENERGY STAR Program Requirements for Residential Refrigerators and/or Freezers. Pl. Ex. 3. LG attempts to characterize DOE's insistence on the proper application of the testing criteria as "a substantial change in the testing criteria," Pl. Mem. at 18, but the facts simply do not support this characterization. As explained above, DOE has not changed the testing criteria. Rather, DOE has simply provided notice to LG of DOE's intention to revoke the limited "exception" to the normal test procedure that LG was given in the November 2008 Agreement. Because DOE has not revised its test procedure for residential refrigerators, the notice and comment requirements of 42 U.S.C. § 6294a and the Administrative Procedure Act ("APA") are simply inapplicable. DOE has consistently and

properly interpreted its own regulations, and that interpretation is entitled to deference. Furthermore, LG has no property interest in the ENERGY STAR program, and, in any event, has been afforded considerable process.

A. LG Cannot Establish that DOE Fundamentally Changed a Prior Definitive Interpretation of the Automatic Ice Maker Exclusion

On November 10, 2009, DOE sent notice to LG that it would no longer be permitted to rely on the exception, contained in Paragraph 3 of the November 2008 Agreement, to DOE's normal testing criteria for refrigerator-freezers with automatic ice makers. The exception has allowed LG to test modified versions of the models at issue in the November 2008 Agreement with the fill tube and ice ejection heaters turned "off." This exception is a clear departure from DOE's normal test procedure, which requires that refrigerator-freezers be tested with their automatic ice makers "on" but "inoperative," and has permitted LG to exclude from its energy consumption measurements energy consumed by these components even when the automatic ice maker is "inoperative." This exception was intended as a limited, temporary measure that LG could use to test only the modified versions of the Affected Models subject to the November 2008 Agreement while it was making its "best efforts to produce ENERGY STAR-rated versions of the Affected Models by January 2009." November 2008 Agreement, at 4 (Pl. Ex. 2). To ensure that this exception would be temporary, the November 2008 Agreement provides that the exception would be "subject to further notice by DOE." *Id*. at 3. The November 2008 Agreement specifically provides that such a "notice" will consist of a letter delivered to LG's Vice President, Government Relations & Communications. *Id.* at 6.

LG has received the "notice" contemplated by the plain terms of the November 2008 Agreement, and its ability to rely on this exception expires, at least with respect to the ENERGY

STAR label, on January 20, 2010. DOE has done nothing more than provide the notice contemplated by the Agreement to revoke the LG-specific, temporary exception to DOE's existing testing criteria. LG is entitled to no more than the notice it received.

Rather than abide by the agreed-upon terms of the November 2008 Agreement, LG has sued DOE under the APA contending that DOE's exercise of its right under the November 2008 Agreement to provide notice revoking that exception constitutes a fundamental change in the testing criteria. LG's characterization of the facts is baseless, and, as a result, its APA claims must fail.

As an initial matter, LG cannot reasonably contend that DOE's interpretation of the regulation setting forth the test procedure for automatic ice makers is arbitrary and capricious. An agency's interpretation of its own regulations must be "afforded deference" and "sustained unless 'plainly erroneous or inconsistent' with the regulation." *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).[8] Here, LG cannot demonstrate that the regulation "will not bear [DOE's] interpretation" or that DOE's interpretation is "plainly erroneous or inconsistent with the regulation." *Paralyzed Veterans*, 117 F.3d at 583-84.

As set forth above, DOE interprets the term "inoperative" as used in HRF-1 § 7.4.2 as requiring that automatic ice makers remain "on" during testing but prevented from actively making or harvesting ice (*i.e.*, not operating) by, for example, "creating a condition in which the

[8] Nor does it matter, for purposes of deference, that the automatic ice maker exclusion was drafted by the Association of Home Appliance Manufacturers ("AHAM") and not the agency. *See Paralyzed Veterans*, 117 F.3d at 585 (holding that an agency's interpretation of its regulation is entitled to deference even if another entity authored the language at issue).

machine senses a full bin of ice." *See* December Guidance, at 3 (Ex. 2). This interpretation is consistent with the definition of automatic ice maker in HRF-1, *see* HRF-1 § 3.5 (Pl. Ex. 7), the description of automatic ice maker "operation" elsewhere in HRF-1, *see* HRF-1, § 7.8.3.2, and the plain meaning of the term "inoperative." This interpretation is also consistent with the purpose of the testing procedures, which is to ensure that refrigerators are tested under condition that "simulate[] typical room conditions." *See* Program Requirements, at 4 (Pl. Ex. 3); *see also* 42 U.S.C. § 6293(b)(3) (testing procedures should produce results that are "representative" of an "average use cycle").

By contrast, LG's interpretation, under which a manufacturer renders an automatic ice maker "inoperative" by simply turning it "off," is not representative of the average consumer's typical use. Although the average consumer's automatic ice maker may often be "inoperative" due to a full bin, most consumers do not normally turn their automatic ice makers "off," as doing so would seem to defeat the purpose of having an automatic ice maker in the first place. And even if, as Plaintiff suggests, some particularly conscientious consumers might conceivably shut "off" their automatic ice makers "before leaving on a vacation," *see* Pl. Mem. at 14, most consumers are not on vacation all year long.

It is well established that the APA's notice-and-comment requirements do not apply to interpretive rules that simply clarify the agency's view of existing law. 5 U.S.C. § 553(b)(A). Seeking to avoid the agency's clear authority to interpret its own regulations, LG argues primarily (indeed, all but one of its APA claims depend on this characterization) that DOE's current interpretation of the testing criteria constitutes "a fundamental change in the ENERGY STAR Program . . . testing criteria" that requires notice and comment. *See* Pl. Mem. at 21; *see*

also Compl. ¶¶ 89-109, 116-120.[9] To prevail in this argument, LG "must show that the 'agency has given its regulation a definitive interpretation, and later significantly revise[d] that interpretation.'" *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Admin.*, 296 F.3d 1120, 1125 (D.C. Cir. 2002) (quoting *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir.1999)). LG cannot carry this burden.

To establish that DOE is significantly revising a prior "definitive interpretation," as LG suggests, LG must show that DOE has previously adopted an "express, direct, and uniform interpretation" of the term "inoperative" in the automatic ice maker exclusion that is fundamentally different from its current interpretation. *See MetWest, Inc. v. Secretary of Labor*, 560 F.3d 506, 510 (D.C. Cir. 2009) (quoting *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999)); *see also Paralyzed Veterans*, 117 F.3d at 586. For example, *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), the case upon which LG principally relies, held that the FAA established "an authoritative departmental interpretation" through (1) a published 1963 agency adjudication that hunting and fishing guides were not subject to certain FAA regulations governing commercial airlines, (2) the agency's uniform advice over a period of thirty years confirming this holding, (3) the FAA's recognition of this "past policy" in 1992, (4) the acknowledgment in 1997 that "'lodge/guide operators have been advised that [the subject regulations] did not address their operation of aircraft,'" and (5) a 1995

[9] *Actual* revisions of ENERGY STAR testing criteria are not subject to the notice and comment rule making procedures of 5 U.S.C. § 553, but the more informal notice and comment provisions of 42 U.S.C. § 6294a. Further, only "*significant* revisions" require 270 day lead time. 42 U.S.C. § 6294a(c)(7) (emphasis added). DOE's prior practice is consistent with this exemption. When DOE did revise the test criteria in the Program Requirements for Residential Refrigerators and/or Freezers in 2007, it did not do so pursuant to the notice and comment procedures of 5 U.S.C. § 553. See Pls. Exs. 3, 5, 6. As explained, in this case, DOE made no revision to the ENERGY STAR test criteria, let alone a significant one.

study describing "'current FAA policy' as permitting guides to fly their customers" without being subject to the regulations. *Id.* at 1035. By contrast, even a direct and explicit adoption of an interpretation by an agency official "is not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position." *Paralyzed Veterans*, 117 F.3d at 587.

LG cannot even point to anything approaching the sort of statement that was rejected as insufficient in *Paralyzed Veterans*. On the contrary, LG relies on two pieces of evidence, neither of which even resembles "a previous inconsistent department interpretation."[10] First, LG claims that "[a]t the time of [the 2008] dispute, a DOE submission acknowledged that the icemaker is to be turned off during testing." Pl. Mem. at 14 (citing Pl. Ex. 11). The "submission" to which LG refers is a PowerPoint slide that was presented in the course of a September 29, 2008 meeting at which representatives of LG, John Taylor and outside counsel John Hodges, were present. *See* McCabe Decl., ¶ 20; Ex. A to McCabe Decl. at 2. As the transcript of that meeting (which is still posted on DOE's website)[11] reveals, however, when the slide was presented, a DOE official, Ronald Lewis, offered as a "point of clarification" that "the phraseology should have been, *the icemaker should have been inoperative, not turned off.*" *See* McCabe Decl., ¶ 20; Ex. A to McCabe Decl. at 36-37 (emphasis added). Thus, this slide, taken together with the testimony from the meeting, is not an "authoritative departmental position" acknowledging that an ice maker is to be turned off during testing. To the contrary, it is strong evidence that DOE recognized the important distinction between turning the ice maker "off" and

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[10] The interpretation of entities other than DOE, *see, e.g.*, Pl. Exs. 9, 10, does not bear on whether DOE has adopted a definitive interpretation of the term "inoperative." *See Paralyzed Veterans*, 117 F.3d at 587.

[11] *See* http://www1.eere.energy.gov/buildings/appliance_standards/residential/refrigerators_freezers_framework_public_meeting.html

rendering it "inoperative" in September 2008, prior to the finalization of the November 2008 Agreement.

Second, LG's attempt to construe the November 2008 Agreement as an authoritative departmental position that fill tube and ice ejection heaters may remain "off" is equally strained and implausible for multiple reasons. To begin with, the November 2008 Agreement specifically states that "DOE's interpretation of the operating conditions specified in HRF-1 . . . require[s] that the ice making system of the refrigerator-freezer be disabled *for purposes of making ice*." *See* November 2008 Agreement, at 3 ¶ 3 (Pl. Ex. 2) (emphasis added). This is entirely consistent with DOE's most recent guidance, which reaffirms the requirement that energy used by an "automatic ice maker" be excluded only insofar as that energy is being used for "active ice making." *See* December Guidance, at 2 (Ex. 2). By contrast, LG's interpretation, which involves disabling the "ice making system of the refrigerator-freezer" by turning it "off," renders the clause "for the purpose of making ice" wholly superfluous. *See Blake Constr. Co. Inc. v. United States*, 987 F.2d 743, 746-47 (Fed. Cir. 1993) ("An interpretation which gives reasonable meaning to all parts of a contract is preferred to one which renders part of it insignificant or useless.").

Furthermore, the only mention in the November 2008 Agreement of the components at issue in this case is in the context of providing to LG an "exception" to "DOE's interpretation of the operating conditions specified in HRF-1." That exception permitted "fill tube and ice ejection heaters . . . to remain off" only (1) "for purposes of testing under [the] Agreement" and (2) "subject to further notice by DOE." *See* November 2008 Agreement, at 3 ¶ 3 (Pl. Ex. 2). It is clear that this paragraph would make little sense if, as LG suggests, the test criteria have

always been understood to exclude energy consumed by fill tube heaters and ice ejection heaters when the automatic ice maker is not in the actual process of making or harvesting ice.

First, if LG were correct, the entire operative clause ("with the exception of the fill tube and ice ejection heaters, which may remain off for the purposes of testing under this Agreement subject to further notice by DOE") would be superfluous because these components would "remain off" as part of disabling the "ice making system . . . for purposes of making ice." *See Blake*, 987 F.2d at 747. Second, the fact that the exception was limited to "testing under this Agreement" suggests that the general rule (*i.e.*, testing that does not occur under the Agreement) is that fill tube heaters and ice ejection heaters may not normally "remain off." Finally, the "notice" referenced in Paragraph 3 is not, as Plaintiff suggests, an acknowledgment that revoking this "exception" would require DOE to engage in formal notice and comment rulemaking. *See* Pl. Mem. at 15-16. Rather, the "notice" in paragraph 3 refers to the type of "notice" referenced in Paragraph 17(h) of the November 2008 Agreement. *See Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1120 (D.C. Cir. 1996) ("We must interpret a contract provision so that it is consistent with the contract as a whole.").

LG's contrary interpretation of the "further notice" provision also makes little sense. If the exception outlined in Paragraph 3 were the rule, as LG contends, then it could not be revoked by the mere publication of a "notice" of proposed rulemaking, which has no legal effect on regulated entities. Rather, the rule could be changed only after "notice," an opportunity to comment, publication of a final rule, and at least 30 days. *See* 5 U.S.C. § 553(b), (c), (d). Of course, the November 2008 Agreement does not reference any of these other procedural requirements that would have to be satisfied before an actual change in the testing rules would

become effective. The absence of any reference to these procedural requirements renders LG's interpretation untenable.[12]

As the foregoing demonstrates, LG cannot sincerely complain that, when the present dispute began, it was blind-sided by DOE's interpretation of the meaning of its test criteria. *See* Whirlpool's Response to Guidance 12-21-09 (Ex. 3). In any event, even assuming LG had no understanding of DOE's interpretation (or had a misunderstanding of DOE's interpretation), DOE is entitled to interpret its regulations in the course of its enforcement efforts designed to "preserve the integrity of the ENERGY STAR label." 42 U.S.C. § 6294a(c)(3). It is a well-established principle of administrative law that "[w]here a statute or legislative rule has created a legal basis for enforcement, an agency can simply let its interpretation evolve *ad hoc* in the process of enforcement . . . ." *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993); *see also Paralyzed Veterans*, 117 F.3d at 588.

Moreover, if LG was still confused about DOE's interpretation of the testing criteria after the parties' negotiations over the November 2008 Agreement, it has received substantial clarification since then. For example, the results of the testing procedures that DOE applied earlier this year, which have been provided to LG, show that the refrigerator-freezers at issue in this lawsuit were tested with the automatic ice maker "on" but "inoperative."[13] Likewise, the

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[12] For these reasons, LG's contention that DOE's interpretation of this provision is "arbitrary and capricious and must be set aside," Compl. ¶ 115, is not likely to succeed on the merits. *See Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 90 (D.D.C. 2009) (Bates, J.) (stating that the scope of review under the arbitrary and capricious standard is narrow, that a court may not substitute its judgment for the agency, and that agency decisions are entitled to a presumption of regularity).

[13] *See, e.g.*, Pl. Ex. 14, at 1 ("Ice maker: On with harvesting off (ice-bin-full condition)"); Pl. Ex. 15, at 4 of 40, ("c) During the test the ice-maker was turned "ON" but no ice was drawn."), 6 of 40 ("· The ice-maker was left turned 'ON' but no ice was drawn during the entire

Nov. 10, 2009 Letter articulated DOE's "interpretation of the operating conditions specified in HRF-1-1979 [as] requir[ing] that the ice making system of the refrigerator-freezer be disabled for purposes of making ice but that all other system components remain on. . . ." Pl. Ex. 1, at 2. And, lest there be any doubt, DOE has now published five pages of interpretative guidance on the meaning of this single word for the benefit of the entire industry. *See* December Guidance (Ex. 2).[14] Accordingly, LG cannot claim that DOE has failed "to provide sufficient information about its testing process." Pl. Mem. at 29. To the extent LG remains confused, it has over twenty days to clear up any confusion and demonstrate that its French door TTD models satisfy the applicable ENERGY STAR criteria.

B. DOE Has Not Deprived LG of a Protected Property Interest Without Due Process of Law

LG's Due Process claim is also unlikely to succeed. The first step in analyzing any procedural due process claim is to determine whether there exists a property interest or liberty interest that has been deprived by the government. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). "[T]he second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). LG cannot satisfy the first of these requirements, nor, even assuming otherwise, the second.

As the Supreme Court explained in *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), "[p]roperty interests . . . are not created by the Constitution. Rather, they are created

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test.").

[14] The December Guidance was issued pursuant to a promise of DOE's General Counsel made on Nov. 25, 2009, before LG had threatened to bring this lawsuit. *See* Nov. 25, 2009 Email from Harris to Wingate, at 1 (Pl. Ex. 1).

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

The property interest LG asserts is its interest in continuing to market its French door TTD models under the ENERGY STAR label. *See* Pl. Mem. at 33. But, LG has no "entitlement to [that] benefit[]," because the Partnership Agreement, which is the "independent source" of this claimed benefit, clearly states that "this agreement is wholly voluntary and may be terminated by *either party* at any time, and for any reason, with no penalty." Partnership Agreement, at 2 (Ex. A to Zoi Decl.). Furthermore, under the Partnership Agreement's dispute resolution procedures, the Agreement "is terminated, either as a whole or in part," if LG fails to agree to take corrective actions within 20 days of a formal notification of DOE's intent to terminate. *Id.* If there was any doubt when this litigation began, DOE has since made it abundantly clear that it is invoking these dispute resolution procedures and its broad authority to terminate the Partnership Agreement as it pertains to the models at issue. *See* December 18, 2009 Letter from Harris to Wingate (Ex. 4). Thus, LG does not have an entitlement to continued participation in the ENERGY STAR Program. *See, e.g., Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1248 (10th Cir. 2008) ("[T]he express contract language does not support Plaintiff's contention that his contract provides him with a protected property interest in continued public employment because the contract makes it abundantly clear that Plaintiff's employer could terminate him

without cause at any time."); *Sanitation and Recycling Indus., Inc. v. New York City*, 107 F.3d 985, 995 (2d Cir. 1997) ("Plaintiffs have no property interest in a waiver of the termination of their existing contracts."); *Econ. Dev. Corp. of Dade County, Inc. v. Stierheim*, 782 F.2d 952, 954 (11th Cir. 1986) (no property interest where contract provided for termination by county "at its convenience"); *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 47 (D.D.C. 1998) (employee has no protected property interest in continued employment when employer has complete discretion to decide not to renew contract); *cf. Refine Constr. Co., v. United States*, 12 Cl. Ct. 56, 67 (1987) (rejecting plaintiff's "premise" that it had a property right in the award of a government contract and stating that "[t]here is no property right to the award of a public contract. No citizen has a 'right' in the sense of a legal right to do business with the government.").

Nor does LG have a "liberty interest" in continued participation in the ENERGY STAR Program. DOE has not "effectively bar[red]" LG "from virtually all Government work due to charges that the contractor lacks honesty or integrity. . . ." *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003) (citing *Old Dominion Dairy Prods., Inc. v. Sec'y of Defense*, 631 F.2d 953, 955-56 (D.C. Cir. 1980)).[15] Rather, DOE has made LG's participation in the ENERGY STAR Program for certain models of refrigerators contingent upon its ability to meet the applicable specifications under the appropriate testing criteria. *See* Nov. 25, 2009 Email from Harris to Wingate, at 2 (Pl . Ex. 1). The temporary impact on LG's business, *see infra* Part III, does not approach, "in terms of practical effect, formal exclusion from a chosen trade or

[15] Nor has DOE designated LG a "foreign terrorist organization," thereby preventing LG from holding bank accounts or receiving material support. *See* Pl. Mem. at 34 (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001)).

profession," and, therefore, no liberty interest has been implicated. *Trifax*, 314 F.3d at 644.

In any event, even if LG *did* have a protected property or liberty interest in its French door TTD models' continued participation in the ENERGY STAR Program, LG has received adequate process. The delisting of LG's French door TTD models from the ENERGY STAR Program that is set to occur on January 20, 2010 is the culmination of almost two years of meetings, negotiations, and correspondence. *See generally* McCabe Decl. ¶¶ 13-41. This most recent round of the controversy began when DOE requested that LG provide units for independent testing by BR Laboratories, Inc., or "submit to DOE a certified test report from an accredited independent testing laboratory, along with all accompanying raw data." *See* September 1, 2001 Letter to John Taylor (Ex. 5). LG chose to send its units to BR Laboratories, Inc. and it has since received the results of those tests indicating that the tests were conducted "in accordance with the procedure outlined in 10 CFR Section 430.23(a) (Appendix A1 to Subpart B of Part 430) (2008)" and that "[t]he ice-maker was left turned 'On' but no ice was drawn during the entire test." *See, e.g.* Pl. Ex. 15 at 6 of 40. These tests (and others, *see* Pl. Ex. 14) confirmed that the tested models did not meet the applicable standard when tested pursuant to the ENERGY STAR testing criteria. *See* McCabe Decl. ¶ 41; Pl. Ex. 15.

Since DOE's November 10, 2009 letter revoking LG's exception to the otherwise applicable criteria, the parties have been in near-constant communication and LG has had substantial opportunity to provide its side of the story to the responsible officials at DOE. *See, e.g.*, Nov. 25, 2009 Email from Harris to Wingate, at 1 (Pl. Ex. 1) ("We have now reviewed and considered the presentations made by LG at our two meetings, and all of the material submitted to us, including your November 24 letter."). In addition, LG has had ample time to "provide[]

DOE with data demonstrating . . . that the models comply with the applicable ENERGY STAR criteria when tested without the [November 2008 Agreement's] exception," *see id.*, but has so far failed to do so.

As a result, LG cannot seriously claim that it has received insufficient process under the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), even assuming *arguendo* that it will soon be deprived of a protected property or liberty interest. First, LG's claim that DOE's decision to prevent LG from using the ENERGY STAR label until it satisfies the applicable standard under proper testing conditions "will irreparably destroy LG's ability to compete effectively and will irreparably damage LG's corporate brand," Pl. Mem. at 33, is a dramatic overstatement. LG has stated both to DOE and to the Court that it is only a few short months from designing models of refrigerator-freezers that will comply with the applicable testing standards. *See, e.g.*, Pl. Ex. 4 at 3. And, as demonstrated *infra* Part III, the harms LG will suffer are temporary and purely economic. Second, there is no risk of an erroneous deprivation. LG has had (and continues to have) ample opportunity to prove through independent testing that its models satisfy the applicable criteria, but it has chosen not to. Finally, as described in detail, *infra* Parts IV & V, the government has a substantial interest in preserving the integrity of the ENERGY STAR label by preventing it from being used by products that are demonstrably *not* energy-efficient.

In sum, the process LG has received during this dispute exceeds what is required by the dispute resolution procedures contained in the Partnership Agreement, and is entirely sufficient under the Fifth Amendment. *See Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 602 (D.C. Cir. 1993) (specific notice, statement of the evidence, and an opportunity to respond

and seek clarification held to be sufficient process for suspension of airline from military airlift transportation program). In short, LG has no likelihood of succeeding on its constitutional claim.

III. LG's Claimed Irreparable Harm is Temporary, Speculative, and of Insufficient Magnitude

To succeed in a motion for preliminary injunctive relief, a plaintiff must demonstrate that it will suffer irreparable harm. This requirement "erects a very high bar for a movant." *Coalition for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008). "[T]he alleged injury must be certain, great, actual, and imminent." *Id.* (citing *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Moreover, the harm must be "more than simply irretrievable; it must also be serious in terms of its effect on the plaintiff." *Id.* (quoting *Gulf Oil Corp. v. Dept. of Energy*, 514 F.Supp. 1019, 1026 (D.D.C. 1981)).

Defendants acknowledge that LG may suffer some harm, at least in the short-term, if its motion for a preliminary injunction is not granted and if LG does not bring its products into compliance with ENERGY STAR specifications within the time permitted. The ENERGY STAR label is, after all, very important to consumers. However, the damage that LG alleges it will suffer does not constitute *irreparable* harm under the precedent of the D.C. Circuit and this Court.

Although LG attempts to characterize the harm it will allegedly suffer in numerous ways, all of the harm is essentially economic in nature: resources LG would have to expend to test its models and bring them into compliance if necessary, and financial losses LG would allegedly suffer from its inability to sell certain French Door TTD models, either because those models might not meet minimum federal standards and could not be sold at all, or because consumers

would shy away from products without an ENERGY STAR label. As a general rule, in the D.C. Circuit, "[e]conomic loss does not, in and of itself, constitute irreparable harm." *Wisc. Gas*, 758 F.2d at 674. Rather, "[t]o successfully shoehorn potential economic loss into a showing of irreparable harm, a plaintiff must establish that the economic harm is *so severe as to 'cause extreme hardship to the business' or threaten its very existence*." *Coalition for Common Sense*, 576 F. Supp. 2d at 168 (emphasis added).

The economic losses alleged here do not meet this high standard. According to LG's own estimates, the maximum financial loss it anticipates if an injunction is not granted is [redacted] Kavanaugh Decl. ¶ 15. LG is a subsidiary of LG Electronics, Inc., a large, global corporation whose annual sales in 2008 were $44.72 billion.[16] Accordingly, the maximum losses LG contemplates would constitute only [redacted] percent of LG Electronics, Inc.'s annual sales. This type of economic loss is not irreparable harm. *See Sandoz, Inc. v. FDA*, 439 F. Supp. 2d. 26, 32 (D.D.C. 2006) (loss of less than 1 percent of total sales would not be irreparable harm);[17] *Apotex, Inc. v. FDA*, No. Civ.A. 06-0627 JDB, 2006 WL 1030151, at *16-17 (D.D.C. Apr. 19, 2006) (sales loss of $9.9 million, which constituted 1.4 percent of company's $700 million in annual revenue, would not be irreparable harm); *Bristol-Myers Squibb Co. v. Shalala*, 923 F.

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[16] *See* Press Release, LG Electronics, LG Electronics Reports Fourth Quarter 2008 Earnings Results (Jan. 22, 2009), *available at* http://www.lge.com/about/press_release/detail/21074.jhtml (also describing LG Electronics, Inc. as a company "[w]ith annual worldwide revenues exceeding $40 billion"); *see also* Kavanaugh Decl. ¶ 4 (describing LG as a subsidiary of LG Electronics, Inc., "a $45 billion global technology leader").

[17] *Sandoz* is particularly analogous to the case at bar, as the plaintiff, like LG, was a subsidiary of a much larger corporation. The Court compared the alleged loss by the plaintiff to the revenues of the parent corporation, Novartis AG, and determined that the harm to the plaintiff was not irreparable given the large size and wealth of the parent company.

Supp. 212, 220-21 (D.D.C. 1996) (loss of 0.5 percent of total sales would not be irreparable harm).

LG further asserts that the monetary harm would be irreparable because it will be unable to recover monetary damages in this litigation. However, the inability of a plaintiff to recover damages is immaterial to the irreparable harm analysis when the harm would not severely impact the plaintiff. *See Coalition for Common Sense*, 576 F. Supp. 2d at 169 n.3; *Bristol-Myers Squibb Co.*, 923 F. Supp. at 221 (finding the plaintiff's inability to recover damages to be "inconsequential"). Rather, when courts in the D.C. Circuit have found irreparable harm from an unrecoverable financial loss, they have done so where the loss would have affected the plaintiffs much more significantly than the harm alleged here would affect LG. *See, e.g., Serono Labs., Inc. v. Shalala*, 974 F.Supp. 29, 35 (D.D.C. 1997) (irreparable harm found where unrecoverable loss would have been one quarter of the plaintiff's revenues); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 28-29 (D.D.C. 1997) (time and manpower spent, and millions of dollars in costs, constituted irreparable harm "particularly because [plaintiffs were] small companies"). LG is a large, global company with tens of billions of dollars in revenues. It makes and distributes a wide range of products, including cellular phones, televisions, computers, and home appliances. *See generally* http://www.lge.com. It has not shown how a potential temporary dip in revenue from one product line—French Door TTD models—would "cause extreme hardship to [its] business or threaten its very existence;" thus, even if any harm it were to suffer would not be recoverable as damages, such harm would still not be irreparable.

Perhaps because it recognizes the limits of relying on the possibility of monetary harm, LG attempts to frame various types of economic harm as non-monetary. For example, it alleges

that it may lose "market share" if an injunction is not issued, and argues, relying on cases from outside this circuit, that such harm would be irreparable. *See* Pl. Mem. at 37 (citing cases). However, "[c]ourts within the [D.C.] Circuit have generally been hesitant to award injunctive relief based on assertions about lost opportunities and market share." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42-43 (D.D.C. 2000); *see also Biovail Corp. v. FDA*, 448 F. Supp. 2d 154, 164 (D.D.C. 2006) ("the fact that the plaintiff will face competition in the market and may lose profits . . . is insufficient to establish irreparable harm"). To the extent that LG might suffer a temporary diminution in its market share, such losses can be regained over time through the normal business competition that occurs in the marketplace. *See Cent. & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 308-09 (D.C. Cir. 1985) ("[R]evenues and customers lost to competition which can be regained through competition are not irreparable."). Moreover, a loss of market share is simply lost sales and profits by another name; it "cannot be called anything other than 'merely economic.'" *Apotex*, 2006 WL 1030151, at *17.

LG also asserts that its business reputation will be damaged if an injunction is not issued. Like loss of market share, damage to business reputation is simply another type of economic loss. *See Biovail*, 448 F. Supp. 2d at 164 ("The plaintiff's claims of potential harm to its business reputation are, at their core, arguments that it will suffer economic harm."). Thus, such damage must be extremely severe to constitute irreparable harm. *Cf. Hunter v. F.E.R.C.*, 527 F. Supp. 2d 9, 16 (D.D.C. 2007) (noting that "*destruction* of a plaintiff's business reputation can constitute irreparable harm") (emphasis added). This is not the case here. As with the monetary losses, any damage to LG's reputation will be limited in scope to the market for French Door

TTD models, which constitute only a small portion of LG's multi-billion-dollar business.[18] Moreover, there can be little doubt that if LG brings its products into compliance with DOE requirements and ENERGY STAR standards, its reputation in that particular market will recover. If LG were to suffer any truly irreparable damage to its reputation, it would not result from any unlawful action by DOE, but from LG's own failure to bring its refrigerators into compliance.

LG also claims irreparable harm by being forced to complete an "impossible task." Pl. Mem. at 39-40. In fact, the clarified testing procedure is far from impossible, and recent developments since the filing of LG's motion have further diminished any theoretical hardship to LG. First, LG is no longer being asked to remove any ENERGY STAR labels "during the holiday season." Pl. Mem. at 39. The deadline for the removal of the ENERGY STAR logo from any improperly labeled products is January 20; accordingly, DOE's actions will have no effect on LG's holiday sales. Second, LG is not being "confronted with an array of conflicting testing options." The appropriate test procedure is straightforward. The automatic ice maker

[18] The cases LG cites in its brief to support the proposition that loss of goodwill can constitute irreparable harm, *see* Pl's. Mem. 38, are clearly distinguishable. The harms contemplated in those cases were much more certain and significant, and most implicated customers' trust in the plaintiff company. *See Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 77 (D.D.C. 2001) (brokerage's loss of its customer list and files to a competitor would be irreparable harm where the "customer list [was] the lifeblood of its business," and the files contained private, sensitive customer data); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (plaintiff was being irreparably harmed by the defendant's improper use of data to contact and solicit the plaintiff's customers); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (plaintiff would lose customer goodwill if it were forced to substantially raise customers' rates and fees while the case was being litigated); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (railway company would lose goodwill if forced to raise prices and pass costs on to customers); *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (company would suffer loss of customers and goodwill if it could not enforce covenant not to compete against former employee who started a competing company).

should be "on" but not actually making ice. *See, e.g.*, Pl. Ex. 14 at 1; Pl. Ex. 15 at 4 of 40, 6 of 40, 26 of 40. Further, to the extent LG remained confused when it filed its motion, DOE issued supplemental guidance on the appropriate testing criteria on December 18, 2009. *See* December Guidance (Ex. 2). Third, DOE has provided LG with a grace period of 127 days to cease distributing models that would exceed the minimum statutory efficiency standard based on the clarified testing procedure, and has asked LG to propose a different date if that timeframe is "infeasible." *See* Nov. 25, 2009 Email from Harris to Wingate, at 2 (Pl. Ex. 1). In short, LG's holiday sales will not be affected, the criteria for compliance are clear, and LG has adequate time to test its models and, if necessary, remove any non-compliant models from distribution.

Finally, much of the harm LG alleges, particularly the economic scenarios it projects, rests on a chain of speculation. Speculative economic harm is insufficient to warrant injunctive relief. *Biovail*, 448 F. Supp. 2d at 158. LG surmises, for example, that if it is forced to temporarily remove certain products from distribution, this "*may* result in long term loss of floor space for LG's refrigerators," and that such a loss "*may* not be recovered until convenient for the retailer." Kavanaugh Decl. ¶ 10 (emphasis added). It similarly speculates that "*it is possible* that all of LG's French Door models with through-the-door ice and water dispensers will no longer meet minimum energy requirements and will not be sellable." *Id.* at ¶ 15 (emphasis added). Likewise, it fears that its ability to fully participate in the new Energy Efficient Appliance Rebate Program in 2010, a year in which "*there is expected* to be a heightened focus on Energy Star promotions," could be compromised. *Id.* at ¶ 16 (emphasis added). Again, DOE does not contest the point that LG may suffer some economic harm if an injunction is not granted and if LG does not take corrective action to comply with ENERGY STAR specifications. However,

there is a significant difference between the temporary, discrete harm that may result— testing expenditures and a possible dip in sales—and the dire picture LG paints in its motion, which is too speculative to support a preliminary injunction.

IV. Permitting LG to Continue Marketing Inefficient Refrigerator Freezers Under the ENERGY STAR Label Will Substantially Injure Consumers, LG's Competitors, other Participants in the ENERGY STAR Program, and the Government

Whatever harm LG will suffer is substantially outweighed by the harm the issuance of a preliminary injunction will cause to consumers, other ENERGY STAR partners, and the ENERGY STAR Program.

First, consumers of LG's French door TTD models will mistakenly purchase LG models in reliance on the ENERGY STAR label, believing them to be more efficient than they actually are. Those consumers will be harmed when they receive utility bills that reflect energy usage for their new refrigerator-freezer that is 20-35% greater than what they had been expecting based on the EnergyGuide labels affixed to these models. *See* McCabe Decl. ¶ 40. True, these unfortunate consumers could rectify this problem by simply turning their automatic ice maker "off," *see* Pl. Mem. at 14, but paying for an automatic ice maker that fails to automatically make ice also constitutes substantial harm to these consumers.[19] The harm caused by permitting LG to continue to apply the ENERGY STAR label to products that do not meet the applicable criteria weighs significantly against granting the preliminary injunction.

Second, other manufacturers that are providing energy efficient refrigerators are harmed when LG's much less efficient models are allowed to bear the same ENERGY STAR label.

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[19] Indeed, according to LG's website a model without TTD ice and water service similar to one of the (slightly smaller) models with TTD ice and water at issue in this case costs $800 less. *See* (Ex. 6) *available at* www.lge.com/us/appliances/refrigerators/index.jsp?s_kwcid=TC|9601|lg%20refrigerators||S|b|3411631286.

Currently, every manufacturer of refrigerator-freezers must apply the testing criteria as interpreted by DOE, with *one exception* — LG. *See* Whirlpool's Response to Guidance 12-21-09 (Ex. 3).[20] That competitive distortion will be rectified on January 20, 2010, unless the Court grants a preliminary injunction preventing DOE from revoking the exception. *See* Motion for a Preliminary Injunction, ¶ 5 (Dckt #3). Furthermore, a preliminary injunction requiring DOE to follow the notice and comment procedures of 42 U.S.C. § 6294a(c) or 5 U.S.C. § 553 before enforcing its long-standing interpretation of the testing procedures will also benefit LG and harm its competitors. DOE has tested the French door TTD models of LG's major competitors under the appropriate interpretation of the testing criteria (*i.e.*, with the ice maker "on" but "inoperative"), and, with the exception of one model,[21] all of these French door TTD models satisfied both the minimum efficiency standards and the heightened ENERGY STAR standards. McCabe Decl. ¶ 42; *see also* Whirlpool's Response to Guidance (Ex.3). As a result, any unwarranted requirement to proceed through an extended notice and comment process will inure to LG's benefit, at the expense of its competitors. *See Thompson Van Lines, Inc. v. United States*, 381 F. Supp. 184 (D.D.C. 1974).

Third, granting the requested preliminary injunction will substantially harm ENERGY STAR partners from across nearly every sector of the economy who have made substantial investments in designing products that legitimately meet the heightened energy-efficiency standards required to utilize the ENERGY STAR label. *See* Zoi Decl. ¶ 22. Two thousand six

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[20] To be clear, the soon-to-expire exception only applies to the Affected Models described in the November 2008 Agreement. Other refrigerator-freezers manufactured by LG should already be using the testing criteria as interpreted by DOE.

[21] According to DOE, a single model of one of LG's competitors satisfied the minimum efficiency standards but not the heightened ENERGY STAR standards. McCabe Decl. ¶ 42.

hundred and forty-five manufacturers have made the investments necessary to sell ENERGY STAR rated products. *Id.* at ¶ 17. The harm that they will suffer if the Court enjoins DOE's ability to "preserve the integrity of the ENERGY STAR label," 42 U.S.C. § 6294a(c)(3), substantially outweighs the temporary harm that LG will suffer if its motion is denied.

Finally, granting a preliminary injunction *will* substantially harm DOE's ability to enforce compliance with the ENERGY STAR criteria and to comply with the statutory mandate that it "preserve the integrity of the ENERGY STAR label." 42 U.S.C. § 6294a(c)(3). As explained above, the partnership agreements from which the ENERGY STAR Program is constructed provide for informal and expedited dispute procedures, and termination by DOE "at any time, and for any reason, with no penalty." Standard ENERGY STAR Partnership Agreement, at 2 (Ex. 1). Abrogation of this bargained-for authority, in even one case, could undermine DOE's ability to enforce compliance with ENERGY STAR criteria across all product lines. This is precisely the sort of harm that federal courts in this circuit have considered when denying requests for preliminary injunctive relief. *See Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008) ("[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce."); *Hunter v. FERC*, 527 F. Supp. 2d 9, 18 (D.D.C. 2007) (denying a request for a preliminary injunction due to "the harm that issuing an injunction would cause to FERC's

enforcement authority.").[22] For all of these reasons, the balance of the equities favors denying LG's request for preliminary injunctive relief.

V. The Public Interest Requires Denial of LG's Motion for a Preliminary Injunction

"The public interest is a uniquely important consideration in evaluating a request for a preliminary injunction." *Nat'l Assoc. of Farmworkers*, 628 F.2d at 616. As the Supreme Court recently emphasized, "'courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter v. Natural Res. Def. Council, Inc.*, —U.S.—, 129 S.Ct. 365, 376 -377 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S., 305, 312 (1982)). The public interest here clearly favors denial of LG's request for preliminary injunctive relief.

The ENERGY STAR Program serves vital public interests. It serves the environment by encouraging more prudent use of scarce resources and by reducing pollution associated with the generation of electricity. Zoi Decl. ¶ 25. It serves the national economy by spurring innovation, and is an important part of the government's effort to stimulate economic growth. *Id.* at ¶¶ 22, 23. And, it furthers the effort to reduce our nation's dependence on foreign sources of energy, a critical national security objective. *Id.* at ¶ 24. The ENERGY STAR Program's continuing ability to serve these interests, however, relies on the integrity of the ENERGY STAR label.

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[22] LG's reliance on *Nat'l Assoc. of Farmworkers Org. v. Marshall*, 628 F.2d 604 (D.C. Cir. 1980), for the contrary proposition is misplaced. That case did not involve a preliminary injunction of the Department of Labor's enforcement authority, but the Department of Labor's authority to waive child labor laws for farm owners without "'objective data' . . . establishing that employment conditions and pesticide exposure would not adversely affect 10 and 11 year olds." *Id.* at 614. DOE is trying to prevent the ENERGY STAR label from being applied to French door TTD model refrigerators that independent testing has found consume 20 to 35% more energy than their advertised energy usage. McCabe Decl. ¶ 40. It is not seeking to permit farm owners to employ children in potentially unsafe conditions.

The preliminary injunction sought by LG would damage DOE's ability to ensure that ENERGY STAR labeled products adhere to the applicable ENERGY STAR specifications, in this case and others. The resulting damage to the ENERGY STAR label and, in turn, the diminishment of the public benefits the ENERGY STAR Program has (and could continue) to provide also weigh in favor of denying LG's motion.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for a Preliminary Injunction.

Date: December 23, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, I electronically filed Defendants' Brief in Opposition to Plaintiff LG Electronics' Motion for a Preliminary Injunction, and the related exhibits and declarations, through the Court's CM/ECF system, which will send notification of such filing to the following individuals:

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